

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
WaveDivision Holdings, LLC and Astound) MB Docket No. 17-361
Broadband, LLC,)
Complainants,) File No. CSR-8948-Z
v.)
Comcast SportsChannel Pacific Associates,)
Comcast SportsNet California, LLC, Comcast)
SportsNet Northwest, LLC, and NBCUniversal)
Media, LLC,)
Defendants)

ORDER

Adopted: March 7, 2018

Released: March 7, 2018

By the Chief, Media Bureau

I. INTRODUCTION

1. In this Order, we dismiss WaveDivision Holdings, LLC and Astound Broadband, LLC's (Wave) petition for declaratory ruling (Petition).1 The Petition asks us to declare that Comcast Cable Communications, LLC and its affiliates (Comcast) violated Section 628(b) of the Communications Act of 1934, as amended (Act), because Comcast engaged in unfair acts and practices that prevented Wave from providing programming to subscribers.2 Although styled as a petition for declaratory ruling, we find that there is no basis to treat Wave's Petition as a declaratory ruling matter and that it instead should be considered as a program access complaint. As discussed below, we dismiss the Petition because Wave did not file within the time limit that our program access rule requires.3

II. BACKGROUND

2. Wave and Comcast entered agreements on October 31, 2014 under which Wave would carry three Comcast-affiliated regional sports networks.4 Those agreements include provisions that require

1 Petition for Declaratory Ruling That Conduct Violates 47 U.S.C. § 548(b), MB Docket No. 17-361 (filed Dec. 19, 2017), https://go.usa.gov/xnHKa (Petition).

2 Id. at 16-24.

3 See 47 CFR § 76.1003.

4 The Petition has inconsistent information about when the parties entered the agreements. Compare Petition at 6 with Petition at 8 (indicating that the parties renewed all agreements on October 31, 2014, but later referring to a renewal in 2013); see also Opposition of NBCUniversal Media, LLC to the Petition of WaveDivision Holdings, LLC and Astound Broadband, LLC for Declaratory Ruling and Request for Waiver, MB Docket No. 17-361 (filed January 22, 2018), https://go.usa.gov/xn6HJ (Opposition) (stating that the parties renewed the carriage agreement for NBC Sports Northwest in October 2013 and the carriage agreements for NBC Sports California and NBC Sports Bay Area in October 2014). We find Wave's Petition to be untimely, as under any potential scenario Wave did not file the complaint within one year of entering into the agreement, as our rules require. Id.

Wave to deliver the sports networks to “a fixed percentage of total subscribers.”⁵ Ultimately, Wave was not able to maintain the contracts’ agreed-upon subscriber penetration percentage terms—a result that Wave attributes to Comcast’s decision to offer its regional sports networks through different distribution methods—and Wave agreed in July 2017 to cure the breach of contract with a payment of damages to Comcast.⁶ To adhere to the terms of the contract, Wave also delivered the sports networks to all subscribers of its most widely delivered tier in areas where Wave breached the contract.⁷ On December 19, 2017, less than two weeks before the expiration of the agreements and more than three years after the parties executed them, Wave filed the instant Petition. Wave claims in the Petition that Comcast’s decision to offer regional sports networks “from a variety of sources other than Wave” is an unfair act prohibited by Section 628(b),⁸ that Comcast’s refusal to negotiate a remedy for breach that is more favorable to Wave is an unfair act prohibited by Section 628(b),⁹ and that the subscriber penetration rates that Comcast required under the contract significantly hindered Wave’s ability to offer “must have” programming, in violation of Section 628(b).¹⁰ Comcast filed an opposition, asking us to dismiss the Petition because it is time barred, meritless, and moot.¹¹

III. DISCUSSION

3. We reject Wave’s request to treat this proceeding as a declaratory ruling. The Commission established in 1994 that an allegation that a cable operator has violated Section 628 will be considered a program access complaint that is subject to our program access complaint procedures.¹² Wave’s Petition is clearly brought pursuant Section 628(b).¹³ Therefore, we reject Wave’s claim that we should consider this as a declaratory ruling matter, and instead find that it should be considered as a program access complaint.

4. Because this Petition is appropriately considered a program access complaint, we find that it is untimely under the procedural rules for such complaints. Program access complaints are subject to Section 76.1003(g) of our rules, which provides that complainants must file within one year of the date

⁵ Petition at Attachment 1 at para. 3.

⁶ *Id.* at iv, Attachment 2 at paras. 9, 16, and 30.

⁷ *Id.* at 11-12.

⁸ *Id.* at 16-20.

⁹ *Id.* at 20-21.

¹⁰ *Id.* at 21-22.

¹¹ Opposition at 2-3.

¹² In a 1994 Order that clarified the program access rules, the Commission stated explicitly that (1) “the actual rules that set forth the procedural requirements for program access complaints are clear that they apply both to Section 628(b) and Section 628(c) cases” and (2) “the one year ‘statute of limitations’ within which to bring complaints . . . is applicable to all types of program access complaints.” *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 1902, 1951, paras 109-110 (1994). Compare 47 U.S.C. § 548(b) with 47 CFR § 76.1001(a) (the Commission’s program access rule that prohibits general unfair program access practices is nearly identical to Section 628(b)).

¹³ The Petition is titled “Petition for Declaratory Ruling That Conduct Violates 47 U.S.C. § 548(b).” Petition at cover (emphasis added). The text of the Petition confirms that Wave’s claims arise under Section 628(b). See Petition at i, iii, vi, 1-5, 18-19, 22-24; see also Wave’s Reply to Opposition of NBCUniversal Media, LLC, MB Docket No. 17-361 (filed Feb. 1, 2018), <https://go.usa.gov/xnF42>, at i, iii, 2-3, 4-6.

that the parties enter into an allegedly violative contract.¹⁴ Wave filed its Petition more than three years after the parties entered into their contract, so it is time-barred.¹⁵ Accordingly, we dismiss the Complaint. In the alternative, Wave requests that the Commission waive the one-year time limit for bringing a program access complaint and give Wave thirty (30) days to submit its complaint. We deny the requested waiver because Wave articulates no reason to justify waiver of the one-year time limit.¹⁶

IV. ORDERING CLAUSES

5. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i), 4(j), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 548, and Sections 76.1001 and 76.1003 of the Commission's rules, 47 C.F.R. §§ 76.1001, 76.1003, the above-captioned petition for declaratory ruling filed by WaveDivision Holdings, LLC and Astound Broadband, LLC against Comcast SportsChannel Pacific Associates, Comcast SportsNet California, LLC, Comcast SportsNet Northwest, LLC, and NBCUniversal Media, LLC **IS DISMISSED**.

6. **IT IS FURTHER ORDERED** that requested waiver of Section 76.1003(g) of the Commission's rules, 47 CFR §76.1003(g), sought by WaveDivision Holdings, LLC and Astound Broadband, LLC **IS DENIED**.

7. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief, Media Bureau

¹⁴ 47 CFR § 76.1003(g)(1). Paragraphs (2) and (3) of Section 76.1003(g), which are not applicable to this case, respectively state that complaints must be filed within one year of the date that the programmer makes a violative offer or the complainant notifies the programmer that it will file a complaint based on a request to purchase or negotiate for programming that was denied or unacknowledged. 47 CFR § 76.1003(g)(2) & (3). In this case, Wave does not allege that Comcast made a violative offer or that Comcast denied Wave's request to negotiate.

¹⁵ We are unpersuaded by Wave's argument that it could not foresee a violation at the time the contracts were executed. Wave concedes in its Petition that "[e]ach of the RSN Agreements permit carriage on either the 'Lifeline Tier' or an 'Expanded Basic Tier,' provided at least a fixed percent of total subscribers receives the service. Computation against the number of total number of subscribers is not industry standard and thus not required by the vast majority of satellite cable programming providers, including with respect to certain other programming services offered by NBCUniversal." Wave Petition at 7 (footnotes omitted). Thus, Wave knew that it was entering into contracts that contained non-industry standard terms and conditions that could adversely impact Wave. Section 76.1003(g)(1) provided Wave with one year to complain to the Commission regarding such terms and conditions.

¹⁶ See *EchoStar Communications Corp. v. Fox/Liberty Networks, LLC*, Order on Reconsideration, 14 FCC Rcd 10480, 10485-6, para. 14 (CSB 1999) ("All limitations periods and statutes of limitations are premised upon a recognition that, at some specified point in time, potential defendants should be able to proceed with their affairs without the looming possibility of liability."); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.").